Supreme Court, U.S.
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No. 92-1905

In the Supreme Court of the United States

OCTOBER TERM, 1993

RESIDENT COUNCIL OF ALLEN PARKWAY VILLAGE, ETC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Housing Authority of the City of Houston (HACH) had standing to challenge on appeal an injunction against the United States Department of Housing and Urban Development (HUD) that effectively required HUD to withhold or recover money that had already been appropriated to HACH.

2. Whether the Frost-Leland Amendment to the HUD-Independent Agency Appropriations Act of 1988, Pub. L. No. 100-102, Tit. IV, § 415, 101 Stat. 1329-213, provides petitioners with federally enforceable rights under 42 U.S.C. 1983.

3. Whether the Frost-Leland Amendment creates an implied cause of action against a state agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 980 F.2d 1043. The opinion of the district court (Pet. App. 37a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1993. A petition for rehearing was denied on February 26, 1993. The petition for a writ of certiorari was filed on May 27, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Allen Parkway Village (APV) is a public housing project that was built in the 1940s and consists of approximately 1000 units. Pet. App. 9a-10a. It is owned and operated by respondent Housing Authority of the City of Houston (HACH). *Id.* at 9a.

In 1979, the United States Department of Housing and Urban Development (HUD) reserved $10 million in federal funds under the Public Housing Urban Initiatives Program for HACH's use in modernizing APV. Pet. App. 9a; see 24 C.F.R. Pt. 868 (1979). After spending approximately $1.5 million of that amount, however, HACH submitted an application to HUD in August 1984, pursuant to 42 U.S.C. 1437p, to demolish APV, because the project was "obsolete," "physically deteriorated," and "located in a neighborhood which is blighted." Pet. App. 10a. The demolition application contained a relocation plan for APV residents and a replacement housing plan to make up for the loss of APV's 1000 housing units. *Ibid.*

On December 22, 1987, before HUD had acted on HACH's demolition application and before any demolition had taken place, Congress passed Section 415 of the Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-213. Sponsored by Representatives Frost and Leland, that amendment provides that "[n]one of the funds appropriated by this Act or any other Act for any fiscal year shall be used for demolishing * * * Allen Parkway Village, 1600 Allen Parkway, in Houston, Texas." *Ibid.*

2. On January 2, 1989, petitioners—the Resident Council of Allen Parkway Village, an incorporated association of APV residents, and two individual residents of APV, Shirley Johnson and Wessie Scyrus—brought this action against HACH and HUD. They asserted jurisdic-

tion under 28 U.S.C. 1331 and sought declaratory and injunctive relief under the Frost-Leland Amendment, 42 U.S.C. 1983, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 10a-11a. Specifically, petitioners sought "to enforce the Frost-Leland Amendment and to prevent both HUD and HACH from using federal funds to 'prepare, revise and advance' the APV demolition application." *Id.* at 11a.

On April 13, 1989, the district court granted petitioners' request for a preliminary injunction against HACH under the Frost-Leland Amendment.[1] Pet. App. 11a. The district court first held that petitioners had standing under 42 U.S.C. 1983 to bring this action, stating that a tenant "may enforce any federal statutory right appertaining to that status and the facility, particularly where the activity complained of falls into an area protected or regulated by statute." See Pet. App. 11a. With respect to the merits, the district court ruled that the phrase "for demolishing" in the Frost-Leland Amendment refers "not only to the physical act of destruction, but also 'to the process by which destruction is commenced and finished.'" *Ibid.* The district court also concluded that petitioners were likely to prevail on their claim under 42 U.S.C. 1983. Pet. App. 11a.

3. On December 5, 1989, after a lengthy review process, HUD returned the HACH demolition application as unapproved. Pet. App. 12a. HUD reminded HACH of its legal obligation to operate APV as public housing, informed HACH of the availability of federal funds for modernization of APV, and imposed a deadline of January 12, 1990, for HACH to decide on future development. *Ibid.* Although HACH submitted a development plan on

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[1] Petitioners had withdrawn their request for preliminary relief against HUD after HUD agreed to keep them advised of the progress of HACH's application for demolition. Pet. App. 11a.

January 12, 1990, it did not comply with HUD's request for "immediate action * * * to furnish a formal application for approval with respect to any long term modernization, demolition and/or disposition of APV." *Ibid.*

4. On April 4, 1991, the district court issued a permanent injunction. Pet. App. 12a. The court held that HUD's December 5, 1989, denial of the demolition application did not moot petitioners' suit, because "[t]here are live issues in this case as long as HACH fails to use allocated federal funds for their intended purposes, maintenance and renovation of APV, and simultaneously insists on spending the allocated funds on studies that are designed to defeat those purposes." *Ibid.*

On the merits, the district court reaffirmed its prior holding that the phrase "for demolishing" in the Frost-Leland Amendment includes "studying, preparing, or taking steps toward demolition." Pet. App. 12a. The district court thereupon, *inter alia*: (1) prohibited HACH from spending any federal funds on any activity aimed at the total demolition of APV, "including activity designed to establish that rehabilitation and renovation of part or all of APV are useless"; (2) ordered HACH to furnish an accounting of all expenditures of federal funds allocated to HACH since 1979; (3) ordered HACH to present to the court within 60 days a plan to use federally appropriated funds for the repair and upgrading of all or part of APV; (4) ordered that HACH submit an accounting of all expenditures of federal funds allocated to HACH for the repair and renovation of APV; (5) entered a permanent injunction against HACH barring its use of federal funds "to the full extent of" the Frost-Leland Amendment; and (6) ordered that "HUD shall set aside such funds as remain from the $10,000,000 approved appropriation such that these funds are not to be transferred to other projects until further orders of this Court." *Id.* at 12a-14a, 45a.

5. HACH appealed the district court's order. Although HUD did not file a notice of appeal, it submitted briefs in support of HACH's position. Pet. App. 14a, 16a-18a. The court of appeals reversed the district court's permanent injunction and remanded the case with instructions to dismiss petitioners' complaint. *Id.* at 1a-36a.

a. At the outset, the court of appeals addressed two jurisdictional matters. First, it held that HUD's decision to return HACH's demolition application did not moot petitioners' request for injunctive relief, Pet. App. 14a-16a, because "HUD's decision to return HACH's demolition application as unapproved simply does not 'ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 15a, citing *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

Second, the court of appeals held that HUD's failure to file a notice of appeal did not preclude HACH from challenging on appeal the portion of the district court's order directed to HUD. Pet. App. 16a-20a. The court held that by virtue of HUD's failure to file a notice of appeal, HUD was not an appellant before the court of appeals, and that HACH's notice of appeal did not vest the court with jurisdiction over any appeal by HUD. *Id.* at 16a-17a. And the court further stated that HUD "is not a party to the appeal" and that "HUD's status before this court is more akin to the status of an amicus curiae."[2] *Id.* at 17a. The court held, however, that HACH had standing to appeal the portions of the order directed at HUD, because "[t]he money the district court ordered HUD to set aside is, after all, money that has already been appropriated to

[2] The court noted that HUD "has not attempted to expand the scope of HACH's appeal," but rather "has confined its arguments to those raised by HACH." Pet. App. 18a n.1.

HACH," and the district court therefore had "effectively instructed HUD to withhold or recover money that had already been appropriated to HACH." *Id.* at 19a. For that reason, HACH had "a direct monetary stake in attacking this portion of the district court's order." *Ibid.*

b. Reaching the merits, the court of appeals held that petitioners had not stated a claim for which relief could be granted under 42 U.S.C. 1983, against either HACH or HUD. Pet. App. 20a-26a. The court concluded that the Frost-Leland Amendment "does not impose a binding obligation on public housing agencies such as HACH, and therefore it does not create federally enforceable rights within the meaning of § 1983." *Id.* at 26a. The court also held that petitioners' Section 1983 claim against HUD fails "[b]ecause HUD is a federal agency acting under color of federal law," rather than under color of state law, as required by Section 1983.[3] Pet. App. 26a.

Finally, the court of appeals held that petitioners do not have a private right of action against either HACH or HUD under the Frost-Leland Amendment, or a right of judicial review under the APA. Pet. App. 26a-35a. The court reasoned that "[b]ecause the Frost-Leland Amendment does not create any federally enforceable right against HACH under § 1983, there can be no implied right of action against HACH under the amendment itself." *Id.* at 29a. The court similarly found no implied private right of action against HUD, because judicial review of any final agency action by HUD would be available under the APA, and because the Frost-Leland Amendment does not expressly waive the sovereign immunity of the federal government to suits outside the

[3] Petitioners apparently do not seek review of the court of appeals' holding that they do not have a cause of action under 42 U.S.C. 1983 against HUD. See Pet. 11-12.

framework of the APA.[4] *Id.* at 29a-30a. With respect to the APA, the court held that HACH's actions are not reviewable because HACH is not a federal agency (see 5 U.S.C. 701(b)(1), 702), Pet. App. 31a-32a, and that HUD's actions are not subject to judicial review because "HUD has not engaged in any final agency action that is subject to review under [5 U.S.C.] § 702." *Id.* at 32a; see also *id.* at 32a-35a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioners argue that "the Appellate Court has grievously erred by ordering the district court to dismiss a cause of action against a party (HUD) who has not even appeared before the appellate court."[5] Pet. 7.

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[4] Petitioners apparently do not seek review of the court of appeals' holding that they do not have a private right of action under the Frost-Leland Amendment against HUD. See Pet. 12-13.

[5] We do not dispute the court of appeals' holding that HUD could not be regarded as an appellant in that court, since HUD failed to file a notice of appeal. *Farley Transp. Co.* v. *Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369-1370 (9th Cir. 1985), cited by the court of appeals (Pet. App. 17a), stands only for that proposition. It does not follow, however, that the court of appeals was correct in concluding that HUD was not even a party to the appeal—if what the court meant was that HUD is no longer a party to the *case* (as distinguished from being a "party" to HACH's appeal)—and was, instead, "more akin" to an amicus curiae. See *id.* at 16a-17a. In our view, HUD remained a party to the case on appeal, and its status was that of an appellee supporting appellant. Cf. Sup. Ct. R. 12.4. In that capacity, HUD was free to make legal arguments supporting HACH, so long as HUD's arguments, if accepted, would not expand the relief beyond that sought by HACH. HUD did not do so in this case. Indeed, HUD's continued status as a party is reflected in the court of appeals' disposition,

While petitioners correctly recite the unexceptionable proposition that "[a] timely notice of appeal containing the components set forth in Rule 3(c) is a *Mandatory Precondition* to exercise of jurisdiction by a Court of Appeals," *ibid.*, they essentially ignore the court of appeals' holding that HACH had independent standing to appeal the portion of the order that was directed at HUD, because HACH had "a direct monetary stake in attacking this portion of the district court's order." Pet. App. 19a. The court properly reasoned that "[t]he money the district court ordered HUD to set aside is, after all, money that has already been appropriated to HACH," and that the district court therefore had "effectively instructed HUD to withhold or recover money that had already been appropriated to HACH." *Ibid.*

In short, because HACH had a direct financial stake in the portion of the injunction directed at HUD, and because HACH filed a notice of appeal from the entire injunction—not just portions thereof—the appeal by HACH presented the court with the question whether the entire injunction could stand.[6] The court of appeals accordingly did not err in deciding that question.

Because HACH was asserting its own rights, not those of a third party, petitioners' discussion of the doctrine of third-party standing (see Pet. 9) has no bearing on the issues in this case. Nor is there any basis for peti-

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which reversed the injunction against HUD as well as against HACH.

[6] Because HACH had a financial interest in the entire injunction, petitioners' reliance upon *Machella* v. *Cardenas*, 659 F.2d 650, 652 (5th Cir. 1981), and *United States* v. *Miami*, 664 F.2d 435, 445 (5th Cir. 1981) (en banc) (plurality opinion), is misplaced. In any event, a conflict between those decisions and the instant decision would present, at most, an intra-circuit disagreement that would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

tioner's contention that HACH—a party to this action that filed its own notice of appeal from the injunction of April 4, 1991—could not attack the entire injunction unless it "gave written notice of appeal as to the findings against HUD," or "intervene[d] []or ask[ed] to be placed in the stead of HUD at the time the notice of appeal was given." Pet. 10. Having filed a fully sufficient notice of appeal from the entire injunction, HACH was free to argue that the entire injunction should be reversed.

2. Petitioners fare no better with respect to their argument that they have a cause of action under 42 U.S.C. 1983. Once again, petitioners ignore the essence of the court of appeals' holding—that "a straightforward reading of the provision indicates that the Frost-Leland Amendment imposes no 'binding obligation on the States.'" Pet. App. 24a, citing *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 510 (1990). The court so concluded because "the Frost-Leland Amendment is an appropriations rider directed solely to HUD, a federal agency." Pet. App. 24a. Accordingly, the court correctly held that "Congress, by directing its command to HUD, expressed its intent that HUD—not private individuals such as the residents of APV—should enforce the prohibition against using federal funds to demolish the specified public housing projects." *Ibid.*

Petitioners' reliance (Pet. 11-12) on the mandatory language of the Frost-Leland Amendment and on the contention that they are intended beneficiaries of the Amendment misses the point. Although the Amendment undoubtedly forbids the use of federal funds for demolition of APV, it is "strictly appropriational in nature" (Pet. App. 25a) and directed solely at HUD. The Amendment imposes no privately enforceable obligation upon the States. Cf., *e.g.*, *California* v. *Sierra Club*, 451 U.S. 287, 297-298 (1981).

3. Nor is there merit to petitioners' alternative argument (Pet. 12-13) that they have a private right of action against HACH under the Frost-Leland Amendment. Petitioners make the conclusory assertion that "it is unmistakable that Congress intended to create an implied right of action under the Frost-Leland Amendment," in light of "the clear congressional intent that federal funds not be used, directly or indirectly, for the demolition of APV." Pet. 13.

Petitioners fail to appreciate that, as the court of appeals held, Pet. App. 28a-29a, the ruling that the Frost-Leland Amendment creates no federally enforceable rights under 42 U.S.C. 1983 is also dispositive of petitioners' claimed private right of action directly under the Amendment. See *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1370 (1992) (holding that where Congress does not intend to create federally enforceable rights against a state agency, Congress could not have impliedly created a private cause of action against such an agency); see also *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 28 n.21 (1981) ("[b]ecause we conclude that [the statute] * * * confers no substantive rights, we need not reach the question whether there is a private cause of action under [the statute]").

4. Finally, the court of appeals held that "[w]ere HUD to formally define the phrase 'for demolishing' under the Frost-Leland Amendment or approve an application by HACH to demolish all or part of APV, the residents of APV would undoubtedly have the right to review HUD's final agency action under [5 U.S.C.] § 702 for compliance with the Frost-Leland Amendment." Pet. App. 35a. Thus, under the decision below, petitioners are not denied a day in court to prevent HUD from taking final agency action contrary to the Frost-Leland Amendment. The court of appeals correctly held, however, that peti-

tioners do not have a cause of action under either 42 U.S.C. 1983 or the Frost-Leland Amendment itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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